

No. 04-_____

In the

Supreme Court of the United States.

Orrie Tucker and Catherine Tucker,

Petitioners,

-v-

Metrowest Medical Center, f/k/a
Framingham Union Hospital, and
William S. George, M.D.,

Respondents.

**On Petition for Writ of Certiorari to the Appeals Court
of Massachusetts.**

PETITION FOR WRIT OF CERTIORARI

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Questions Presented.

1. Is it consistent with due process for the State court to punish the plaintiffs with the most severe sanction of dismissal of their claims with prejudice and without a trial for their attorney's gross neglect, egregious behavior which the plaintiffs never knew about, condoned or approved?

2. Does it square with fundamental fairness to deny plaintiffs the right to a trial on the merits of their malpractice claims by refusing to characterize their attorney's inexcusable and gross neglect in prosecuting their claims as the kind of "extraordinary circumstance" which justifies relief from a judgment of dismissal under Rule 60(b), especially where the plaintiffs never knew about, condoned or approved of their former attorney's egregious behavior?

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1.

Citations of Opinions and Orders.

The unpublished memorandum and order of the Massachusetts Appeals Court pursuant to its Rule 1:28 in *Orrie Tucker & another v. Metrowest Medical Center et al.*, 60 Mass. App. Ct. 1108(12/18/03), summarily affirming the motion judge of the Superior Court Department, is set forth in the Appendix hereto(App. 1-6).

The unpublished entry of judgment after rescript by the Middlesex Division of the Superior Court Department of Massachusetts in *Orrie Tucker et al. v. Metrowest Medical Center, f/k/a Framingham Union Hospital et al.*, Middlesex Docket No. MICV2000-05888-A(1/21/04), is set forth in the Appendix hereto(App. 7-8).

The order of the Supreme Judicial Court of Massachusetts in *Orrie Tucker & another v. Metrowest Medical Center et al.*, 441 Mass. 1108(5/3/04), denying the plaintiffs-appellants' Application For Further Appellate Review and allowing its late filing, is set for the in the Appendix hereto(App. 9-10).

The unpublished memorandum and order of the Middlesex Division of the Superior Court Department of Massachusetts (Zobel, J.) in *Orrie Tucker & another v. Metrowest Medical Center et al.*, Middlesex Docket No. MICV2000-05888-A(1/10/02), is set forth in the Appendix hereto(App. 11-12).

The excerpts of the Plaintiffs-Appellants' Brief filed in the Appeals Court of Massachusetts in the case of *Orrie and Catherine Tucker v. Metrowest Medical Center, f/k/a Framingham Union Hospital and William S. George, M.D.*, A.C. No. 2002-P-0461, pp. 29-43, is set forth in the Appendix hereto(App. 13-15).

Basis for Jurisdiction in This Court.

The order of the Supreme Judicial Court of Massachusetts, the state court of last resort having jurisdiction to review the decisions of all inferior state courts, refusing to allow further appellate review of the Appeals Court's summary affirmance of the Superior Court's ruling, was entered on May 3, 2004(App. 9-10).

This petition for certiorari by Tucker is filed within ninety (90) days from the date of the order of the Supreme Judicial Court denying Tucker further appellate review of the Appeals Court's decision. 28 U.S.C. Section 2101(c). *American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21(1923).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1257(a).

2.

**Constitutional, Statutory and Rule Provisions
Implicated by This Petition.**

United States Constitution, Amendment XIV, Section 1:

...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Mass. R. Civ. P. 60(b):

(b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3), not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud on the court....

3.

Statement of the Case.

On December 20, 2000, the Petitioners Orrie Tucker and Catherine Tucker (“Tucker”) filed a complaint against the Respondents Metrowest Medical Center f/k/a Framingham Union Hospital (“Metrowest”) and William S. George, M.D. (“Dr. George”), Orrie Tucker’s Primary Care Physician, claiming that both were negligent from on or about December 27, 1996, until November 22, 1997, in failing to diagnose Orrie Tucker’s colon cancer thereby causing him personal injuries and resulting in a loss of consortium and emotional distress for his wife, Catherine Tucker.

Specifically, Tucker claimed that Metrowest and its employee, Dr. George, failed to treat and diagnose properly Orrie Tucker’s presenting symptoms of bloody rectal discharge precipitated by an episode of diarrhea and vomiting in Metrowest’s Emergency Room in December of 1996. Metrowest’s Dr. Brown saw and examined Tucker at this time and felt a large rectal polyp. A gastrointestinal consultation by another doctor at Metrowest (Dr. Bruce Marcel) recommended a stool culture as well as a sigmoidoscopy after Tucker was discharged from Metrowest. However, Dr. George, Orrie Tucker’s Primary Care Physician and Metrowest’s employee, did not follow up with the sigmoidoscopy or a stool culture and they were never performed.

Orrie Tucker was eventually readmitted to Metrowest in November of 1997 with a staphylococcal endocarditis which resulted in his immediate transfer to Brigham and Women’s Hospital for emergency abdominal surgery for adenocarcinoma of the colon by intussusception of the colon and the removal of an eight (8) inch section of the colon requiring a colostomy. The post-operative diagnosis was that the intussusception was induced by a large polyp as the leading point with a carcinoma-in-situ in it. Orrie Tucker did well post-operatively and the colostomy was closed in a few months.

According to Tucker, routine and accepted medical practice dictated that Orrie Tucker’s presenting symptoms in Metrowest’s Emergency Room in December of 1996 of *bloody* rectal discharge precipitated by an episode of diarrhea and vomiting together with Dr. Marcel’s consulting recommendation that a stool culture as well as a sigmoidoscopy be performed after Tucker was discharged, required that Metrowest’s Dr. George, as Tucker’s Primary Care Physician and Metrowest’s employee, perform a sigmoidoscopy and/or a colonoscopy. That he did not do so was the foundation of Tucker’s claim that Metrowest and its employee, Dr. George, had deviated from the standard of care in the circumstances.

As Tucker eventually showed through their expert proof, “[t]he intussusception would not have occurred had the proper follow up of the GI bleed been done because the polyp would not have been there to be a leading point. The colon resection and colostomy would not have been done and the associated discomfort and suffering would not have occurred.”

4.

Both Metrowest and Dr. George answered by denying all of Tucker's allegations, asserting various affirmative defenses and requesting a Medical Malpractice Tribunal pursuant to G.L.c. 231, Section 60B. The Tribunal was convened on April 25, 2001, and Tucker's counsel, Ms. Roberta Golden, informed counsel for Metrowest and Dr. George that she would not submit an offer of proof to the Tribunal but instead would post a \$6,000 bond in order to continue the action regardless of the Tribunal's decision. She did so that day and the Tribunal found that there was insufficient evidence to raise a legitimate question of liability appropriate for judicial inquiry. Two days later, on April 27, 2001, Metrowest and Dr. George jointly moved to increase the amount of the bond consistent with the procedure outlined in *Denton v. Beth Israel Hosp.*, 392 Mass. 277(1984).

On June 28, 2001, the Superior Court Department, Zobel, J., heard the defendants' joint motion to increase the bond. He allowed the motion and set the bond at \$12,000 but stayed its implementation until August 10, 2001, with a further hearing to be held at that time. This ruling was bottomed on Attorney Golden's representation to the Court that she had an expert letter regarding the defendants' liability in this matter but that it was not presently with her in court. Judge Zobel ordered Attorney Golden to fax the letter to the defendants' counsel by the close of that day (June 28, 2001).

Attorney Golden failed to fax the undated expert's letter to the defendants' counsel until July 10, 2001. In addition, defense counsel subsequently learned from the expert (Dr. Charles Lipson) that he had not written his report concerning the defendants' liability until July 5, 2001.

The hearing scheduled for August 10, 2001, was rescheduled for October 30, 2001. Judge Zobel was then informed by defense counsel of Attorney Golden's misrepresentation about the existence of the expert's letter on June 28, 2001, and her subsequent failure to fax the letter to defense counsel until July 10, 2001. The lower court thereupon removed the stay of his previous order, increased the bond to \$12,000 and further ordered that Attorney Golden personally pay the additional \$6,000 for the increased bond "within ten business days" and that it "[n]ot be passed to the client."

With the additional bond of \$6,000 not forthcoming from Attorney Golden by November 13, 2001, Metrowest and Dr. George jointly moved to dismiss Tucker's civil action based upon Attorney Golden's failure to comply with the Court's order. On November 21, 2001, Judge Zobel allowed the defendants' motion and entered an order dismissing Tucker's complaint against both Metrowest and Dr. George with prejudice.

Attorney Golden then filed the required additional bond on December 13, 2001, and moved for a reconsideration under Mass. R. Civ. P. 60(b) of the dismissal of Tucker's claims. On January 11, 2002, Judge Zobel denied the motion. In a memorandum, the lower court wrote that

the difficulties and delays this case has produced
*are due entirely to the unexcused—indeed, inexcusable—
conduct of Plaintiff's [sic] counsel....A party is ordinarily*

5.

entitled to a day in court, however obnoxious the lawyer's conduct. This right is nonetheless not unlimited. As between a plaintiff whose lawyer's conduct has provoked condign punishment and the innocent defendant—put to unfair delay, expense, and uncertainty by plaintiff's counsel's shenanigans—the former should bear the consequences.

(App.11-12)(emphasis supplied in italics and emphasis in original is underlined).

Judgment accordingly entered on January 11, 2002. After noticing an appeal from the judgment, Tucker, now represented by a new attorney, filed a second motion for reconsideration under Rule 60(b). It sought the indulgence of the motion judge to give Tucker their day in court in order to prove their meritorious claims against Metrowest and Dr. George. The motion was based upon Attorney Golden's withdrawal together with the appearance of new counsel, the resubmission of the cash surety bond of \$6,000 and the notion that Tucker should not be unfairly penalized by denying them their day in court for the conduct of their prior counsel. On April 23, 2002, the Superior Court Department, Locke, J., denied Tucker's second motion for reconsideration.

Tucker appealed this judgment to the Appeals Court. In their Brief as the Plaintiffs-Appellants, Tucker argued *inter alia* that this procedural scenario which resulted in the dismissal of their complaint for the egregious misconduct of their counsel in failing to pay timely the bond as ordered deprived them of due process and the equal protection of the laws as guaranteed them by the federal constitution(App.13-15).

On December 18, 2003, the Appeals Court of Massachusetts in an opinion issued under its Rule 1:28, summarily affirmed the decision of the Superior Court Department dismissing Tucker's civil action. *Orrie Tucker & another v. Metrowest Medical Center & another*, 60 Mass. App. Ct. 1108 (2003)(App. 1-6). In its unpublished memorandum, the Appeals Court ruled that Judge Zobel did not abuse his discretion in increasing the amount of the bond(App.4-5). Moreover, when Attorney Golden then failed to pay the additional bond on time, it ruled that the lower court did not err "in allowing the defendants' motion to dismiss for failure to file the bond"(App. 5).

The Appeals Court further observed that the lower court was not obligated to allow Tucker's motions for reconsideration "in view of the plaintiffs' attorney's dilatory actions"(App. 5-6, n.6). As it ruled, "[a]n enlargement of time is appropriate when the failure to file a bond is excusable neglect on the part of plaintiff's counsel, where there is 'no question of irregular behavior on the part of counsel or [her] seeking tactical advantage through any pretense.'"(App. 5 quoting *Goldstein v. Barron*, 382 Mass. 181, 186-187 (1980)).

6.

However, because Attorney Golden's conduct was *more than mere excusable neglect and constituted "irregular behavior"* on her part, the Appeals Court held that this decisional law did not apply and that Tucker's reconsideration motions were rightly denied(App.5-6). The Appeals Court failed to address Tucker's constitutional arguments that this peremptory dismissal of their action without a trial based on the gross oversights of their attorney unfairly denied them their constitutional right to due process and the equal protection of the laws.

Tucker then filed an Application for Leave to Obtain Further Appellate Review of this decision with the Supreme Judicial Court of Massachusetts. Besides rehearsing all of the facts already identified herein, Tucker emphasized that there is no evidence in this record that Orrie Tucker or Catherine Tucker had engaged in willful or bad faith conduct or that *Tucker's* conduct in any way formed a part of Judge Zobel's justification for ordering a dismissal of their complaint against Metrowest and Dr. George.

That is, Judge Zobel *never* found or ruled that *the client Tucker* had engaged in willful or bad faith conduct. In addition, Judge Zobel's rulings, even Judge Locke's subsequent ruling, were based *solely* upon *counsel's* conduct, *not* the clients' behavior. Nor was it found that Tucker knew about, condoned or otherwise approved of their counsel's gross neglect in failing to secure in a timely manner the increased bond or in failing to produce the expert's letter when ordered to do so.

Tucker's application argued that in the unusual or extraordinary circumstances where an attorney's conduct in the course of litigation reaches the dimensions of *gross* neglect or egregious conduct, and there is an absence of any neglect by the clients themselves, there is no justifiable reason in law to impute such egregious conduct to the party and thereby deprive them unconstitutionally of their day in court on their legitimate claims.

Following the Supreme Judicial Court's denial of Tucker's application on May 3, 2004 (App.9-10), Tucker now brings their petition in this Court seeking a writ of certiorari to the Appeals Court of Massachusetts.

Reasons Supporting Allowance of the Writ.**An Emerging Consensus Among the Lower Courts That Imposing The Most Severe Sanction of Dismissal Upon Innocent and Faultless Clients For The Gross Neglect and Egregious Conduct of Their Attorneys Is A Violation of Due Process Warrants the Granting of This Petition.**

Tucker's successive motions for the lower court's reconsideration of its dismissal of their complaint were treated by the Massachusetts courts as if labeled consistent with their obvious purpose, i.e., as if brought under Mass. R. Civ. P. 60(b)(1) or (6), or both. *Stilian v. GTC Corporation*, 17 Mass. App. Ct. 953, 953(1983). *Mullen Lumber Company, Inc. v. F.P. Associates, Inc.*, 11 Mass. App. Ct. 1018, 1019(1981). Rule 60(b) of the Massachusetts Rules of Civil Procedure is substantially the same as Fed. R. Civ. P. 60(b). *Chavoor v. Lewis*, 801, 804 n.1(1981). The Massachusetts appellate courts thus give this state rule of procedure the same construction given the cognate Federal rules. *Pentucket Manor Chronic Hospital, Inc. v. Rate Setting Commission*, 394 Mass. 233, 236-237(1985). *Parrell v. Keenan*, 389 Mass. 809, 815 n.8(1983). *Farley v. Sprague*, 374 Mass. 419, 423-424(1978).

Accordingly, the federal courts' interpretation of Rule 60(b) is profoundly relevant to the scope of Rule 60(b) in Massachusetts practice and the breadth of relief it provides litigants here. Moreover, this Court has the final responsibility to formulate the controlling rules for hearings and proof which precede the entry of default judgments in order that those rules of procedure provide the parties with due process in their reach and result. *Klapprott v. United States*, 335 U.S. 601, 611(1949) (Black, J.) citing *McNabb v. United States*, 318 U.S. 332, 341(1943).

Tucker submits that an emerging consensus among the lower courts interpreting Rule 60(b) holds that imposing the most severe sanction of dismissal upon innocent and faultless clients such as Tucker for the gross neglect and egregious conduct of their attorneys is a violation of due process and that this consensus warrants the granting of this Petition. This Court has yet to rule on this precise question and, as the tribunal with the final say in how rules of civil procedure are implemented so that they provide fundamental fairness and due process to litigants, it should allow Tucker's Petition and take this opportunity to define with precision the kind of neglect by an attorney which will be imputed to clients in order to punish them with dismissal of their claims for its commission. It should then reverse and vacate the judgment below and remand this matter to the Superior Court Department for further discovery and an eventual trial because the gross neglect and egregious conduct by Tucker's counsel here cannot fairly be imputed to them and because a denial of their day in court on their claims as a result of it is a denial of due process.

8.

Most actions taken by the parties' legal representative in the course of litigation are rightly imputed to those parties since those who decides to incur the expenses of retaining a lawyer should be able to rely on that lawyer to tend to the legal business at hand in a manner consistent with their interests. The presumption is that the client has notice of all facts known to his lawyer-agent; and even the negligence of the parties' attorney will be imputed to those parties.

In *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-634(1962), Justice Harlan, writing for the Court's majority of four, stated that plaintiff's counsel's unexcused failure to appear at a pre-trial conference in an auto tort case because of a scheduling conflict was reason enough to dismiss the action with prejudice under Fed. R. Civ. P. 41(b):

[t]here is certainly no merit to the contention that dismissal of Petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."

Id. quoting *Smith v. Ayer*, 101 U.S. 320, 326(1879). In a footnote, the *Link* Court further noted that "keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of [the] plaintiff's lawyer upon *the defendant*." *Id.* at 634 n.10 (emphasis in original).

However, nothing in *Link* resolved the lower court's power to address the same problem under Rule 60(b). As Justice Harlan explained, "[p]etitioner never sought to avail himself of the escape hatch provided by Rule 60(b)." *Id.* at 632. In addition, this Court made clear that it was *not* considering whether the District Court would have been abusing its discretion had it rejected a motion by the petitioner under Rule 60(b) "which was accompanied by a more adequate explanation for the absence of petitioner's counsel from the pretrial conference." *Id.* at 635.

In *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 396-397(1993), this Court reiterated the *Link* principle that "clients must be held accountable for the acts and omissions of their attorneys." *Id.* citing *United States v. Boyle*, 469 U.S. 241, 250(1985)(late return of a tax filing). *Link* involved a late filing by respondents (unsecured creditors) in bankruptcy beyond the bar date. *Id.* at 384. The Bankruptcy Rule 9006(b)(1) allowed such late filing if it were

the result of “excusable neglect.” *Id.* at 385. While the *Link* Court affirmed the court of appeals’ decision providing relief to the unsecured creditors on the basis of excusable neglect, it expressly rejected the notion that the late filing by counsel could not be attributed to the clients. *Id.* at 396-397.

In so ruling, Justice White wrote that “at least for purposes of Rule 60(b), ‘excusable neglect’ is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence.” *Id.* at 394. He distinguished those cases of ordinary negligence by a party or his attorney under Rule 60(b)(1) from those cases under Rule 60(b)(6) demonstrating “extraordinary circumstances” beyond the parties’ control. *Id.* at 393-394. That is, “[b]ecause of the language and structure of Rule 60(b), a party’s failure to file on time for reasons beyond his or her control is not considered to constitute ‘negligence.’” *Id.* citing *Klapprott*, 335 U.S. at 613-614. In this latter situation under Rule 60(b)(6), relief would be warranted if “the party is faultless in the delay.” *Id.* at 393-394 citing *Ackermann v. United States*, 340 U.S. 193, 197-200(1950).

Klapprott’s language is instructive. There the petitioner, a naturalized citizen of the United States but an alleged German national, had been defaulted from having a denaturalization hearing because he had been incarcerated for four years by the government and was unable to obtain representation to defend against this denaturalization proceeding. 335 U.S. at 603; 614-615. In reversing the default judgment which had entered against him, this Court wrote:

[A]ll petitioner has asked is that the default judgment be set aside so that for the first time he may defend on the merits. Certainly the undenied facts alleged justify setting aside the default judgment for that purpose. *Petitioner is entitled to a fair trial.* He has not had it. Fair hearings are in accord with elemental concepts of justice, and the language of the “other reason” clause of [Rule] 60(b) is broad enough to authorize the Court to set aside the default judgment and grant petitioner a fair hearing.

Id. at 615(emphasis supplied). See *United States v. Karahalias*, 205 F.2d 331, 335(2nd Cir. 1953)(Hand L., J.).

In the aftermath of the this Court’s holdings in *Klapprott*, *Link* and *Pioneer*, the lower courts have formulated their own conclusions about when the gross and inexcusable neglect by an attorney, truly egregious conduct like Tucker’s counsel here, in the prosecution of a civil action will be imputed to clients in order to justify punishing them with the ultimate sanction of dismissal of their claims with prejudice for its commission.

10.

Five federal circuit courts of appeals together with two federal circuits have agreed that an attorney's gross and inexcusable conduct, like the conduct here described by Judge Zobel, is the precisely the kind of "extraordinary circumstance" within Rule 60(b) for which a faultless and unknowing client should *not* be held responsible and that relief from judgment entered for this reason should be allowed under Rule 60(b) in order to give a party his day in court consonant with due process. *Greenspun v. Bogan*, 492 F.2d 375, 382(1st Cir. 1974). *Carter v. Albert Einstein Med. Ctr.*, 804 F.2d 805, 806-808(3rd Cir. 1986). *In re Virginia Info. Sys. Corp.*, 932 F.2d 338, 342 (4th Cir. 1991). *Shepard Claims Serv., Inc. v. William Darrah & Assocs.*,796 F.2d 190,195(6th Cir. 1986).*Community Dental Services v. Tani*, 282 F.3d 1164, 1168-1171 (9th Cir. 2002). *L.P. Stewart, Inc. v. Matthews*, 329 F.2d 234, 235(D.C. Cir. 1964). *Primbs v. United States*, 4 Ct. Cl. 366, 370(1984). See also *King v. Mordowanec*, 46 F.R.D. 474, 477-478(D. R.I. 1969); *United States v. Cirami*, 563 F.2d 26, 34-35(2nd Cir.1977).

Tucker's cause of action is a valuable property right entitled to due process protection. *Board of Regents v. Roth*, 408 U.S. 564, 571-572(1972). It cannot be taken away without notice and a hearing. *Id. Mathews v. Eldridge*, 424 U.S. 319, 333(1976). *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). To hold, as the Massachusetts courts have now held, that the gross and inexcusable neglect of an attorney in prosecuting a case should now be visited on the clients in the form of a dismissal of their action with prejudice is a denial of due process, is fundamentally unfair and runs counter to the emerging consensus among the lower courts that imposing this most severe sanction upon innocent and faultless clients like Tucker for the gross neglect and egregious conduct of their attorney is a violation of due process.

In this regard, Justice Black's observations in his dissenting opinion in *Link*, 370 U.S. at 648-649, are apt:

...I think it would be far better in the interest of the administration of *justice*, and far more realistic in the light of what the relationship between a lawyer and his client actually is, to adopt the rule that no client is ever to be penalized, as this plaintiff has been, because of the conduct of his lawyer unless notice is given to the client himself that such a threat hangs over his head. Such a rule would do nothing more than incorporate basic constitutional requirements of fairness into the administration of justice in this country.

....

[I]t is of very great importance to everyone in this country that we do not establish the practice of throwing litigants out of court without notice to them solely because they are credulous enough to entrust their cases to lawyers whose names are accredited as worthy and capable by their government.

Id. (emphasis in original). See *Ackermann*, 340 U.S. at 205("It does no good to have liberalizing rules like 60(b) if, after they are written, their arteries are hardened by this Court's resort to ancient common-law concepts.") (Black, J., dissenting).

11.

Conclusion.

For all of the reasons identified herein, this Court should grant Tucker's petition for certiorari to the Appeals Court of Massachusetts, enter an order vacating the judgment below and remanding the matter to the Middlesex Division of the Superior Court Department for a jury trial of Tucker's claims; and/or provide them with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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